

In the United States  
Circuit Court of Appeals  
For the Ninth Circuit.

In the Matter of

HENRY E. SHERER,

Bankrupt.

V. W. ERICKSON, as Trustee in Bankruptcy of the  
Estate of Henry E. Sherer,

Appellant,

vs.

FRIEND W. RICHARDSON, as Superintendent of  
Banks of the State of California, and in charge of the  
Bank of San Pedro, an insolvent California state bank-  
ing corporation,

Appellee.

Transcript of Record.

Upon Appeal from the District Court of the United States for the  
Southern District of California, Central Division.

FILED

JUN - 5 1935



No.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original record are printed literally in italics; and, likewise, cancelled matter appearing in the original record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

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Names and Addresses of Solicitors.

For Appellant V. W. Erickson, Trustee in Bankruptcy of  
the Estate of Henry E. Sherer:

GRAINGER AND HUNT, Esqs.,

REUBEN G. HUNT, Esq.,

Board of Trade Building,

Los Angeles, California.

For Appellee Friend W. Richardson, Superintendent of  
Banks:

CLOCK, McWHINNEY & CLOCK, Esqs.,

JOHN G. CLOCK, Esq.,

Jergins Trust Building,

Long Beach, California.

IN THE DISTRICT COURT OF THE UNITED  
STATES SOUTHERN DISTRICT OF CALI-  
FORNIA CENTRAL DIVISION

In the Matter of )  
 )  
HENRY E. SHERER, ) No. 24,925-H  
 ) CITATION ON APPEAL  
Bankrupt )

UNITED STATES OF AMERICA—SS.

The President of the United States of America to Friend W. Richardson, as Superintendent of Banks of the State of California and in charge of the liquidation of the Bank of San Pedro, an insolvent California state banking corporation, GREETING:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit to be holden at San Francisco, California within thirty (30) days from the date hereof, pursuant to an order allowing an appeal of record in the office of the Clerk of the above entitled Court wherein V. W. Erickson, as Trustee in Bankruptcy of the estate of Henry E. Sherer is the Appellant, and you are the Appellee, to show cause, if any there be, why the order made and entered herein by the above entitled Court on May 13, 1935, affirming the order of S. W. McNabb, Referee in Bankruptcy in the above entitled proceeding, made on May 9, 1935, allowing at \$260,200.00 the gen-



eral claim filed in said proceeding by said Friend W. Richardson, as Superintendent of Banks of the State of California and in charge of the liquidation of the Bank of San Pedro, an insolvent California state banking corporation, should not be reversed and said claim disallowed.

WITNESS the Honorable HARRY A. HOLLZER, United States District Judge for the Southern District of California this 16 day of May, 1935.

Hollzer  
DISTRICT JUDGE

[Endorsed]: Received copy of the within Citation on Appeal Petition for Appeal and Order Allowing Appeal Assignments of Error this 17 day of May 1935, Clock, McWhinney & Clock Attorney for Friend W. Richardson, as Superintendent of Banks etc. Filed May 20 1935 at 10 min. past 11 o'clock a. m. R. S. Zimmerman, Clerk Theodore Hocke, Deputy

[TITLE OF COURT AND CAUSE.]

ORDER CONFIRMING ORDER OF REFEREE  
ALLOWING CLAIM

FRIEND W. RICHARDSON, as Superintendent of Banks of the State of California and in charge of the liquidation of the Bank of San Pedro, an insolvent state banking corporation, having filed in the above entitled proceeding a general claim in the sum of \$260,200.00 based upon the liability of the bankrupt, as a stockholder of said bank, pursuant to the laws of the State of California relating to state banks, and V. W. ERICKSON, the Trustee in Bankruptcy herein, having filed written objections to the allowance of the said claim, and SAMUEL W. McNABB, the Referee in Bankruptcy of the above entitled Court before whom the administration of the bankrupt estate is pending, having heard and considered such objections and overruled the same and made on May 9, 1935, an order allowing such claim, and the said Trustee in Bankruptcy having filed herein a petition for a review by the Judge of such order, pursuant to the provisions of General Order No. XXVII of the Supreme Court of the United States relating to bankruptcy, and the said petition for review coming on regularly to be heard before the above entitled Court this 13th day of May, 1935, REUBEN G. HUNT, Esquire, of the firm of GRAINGER & HUNT, appearing as counsel for the Trustee in Bankruptcy, and JOHN G. CLOCK, Esquire,

appearing as counsel for said Superintendent of Banks, and the matter having been heard and considered by the Court and submitted to the Court for decision,

IT IS HEREBY ORDERED that the said order of the Referee be and the same is hereby confirmed and that the said claim be allowed as a general claim against the bankrupt estate in the sum of \$260,200.00.

Dated this 15th day of May, 1935.

Hollzer  
DISTRICT JUDGE

APPROVED as to form pursuant to Rule 44 of this Court.

GRAINGER AND HUNT

By Reuben G. Hunt

Attorneys for Trustee

CLOCK, McWHINNEY & CLOCK

By John G. Clock

Attorneys for Superintendent of Banks

[Endorsed]: Filed May 16 1935 at 30 min. past 9 o'clock a. m. R. S. Zimmerman, Clerk Theodore Hocke, Deputy.

IN THE DISTRICT COURT OF THE UNITED  
STATES SOUTHERN DISTRICT OF CALI-  
FORNIA CENTRAL DIVISION

	)	No. 24,925-H
In the Matter of	)	
	)	AGREED STATEMENT
HENRY E. SHERER,	)	OF THE CASE IN LIEU
	)	OF RECORD
Bankrupt	)	PURSUANT TO
	)	EQUITY RULE 77

Pursuant to Equity Rule 77, the parties hereto, believing that the questions presented by the appeal herein from the order of the above entitled Court dated May 13, 1935, confirming on review an order of the Referee in Bankruptcy of the above entitled Court, before whom the administration of the bankrupt estate is pending, made on May 9, 1935, allowing as a general claim as against the bankrupt estate the claim filed herein by Friend W. Richardson, as Superintendent of Banks of Southern California and in charge of the liquidation of the Bank of San Pedro, an insolvent California state banking corporation, can be determined by the United States Circuit Court of Appeals for the Ninth Circuit to which the said appeal has been taken and allowed, without an examination of all the pleadings and evidence, present this statement of the case showing how the questions arose and were decided in said District Court, and setting forth such of the facts alleged and proved or sought to be proved as are deemed essential to a decision of such questions by said United States Circuit Court of Appeals for the Ninth Circuit, as follows:

On January 21, 1935, the above named Henry E. Sherer filed in the above entitled proceeding his voluntary petition in bankruptcy with schedules and was thereupon adjudicated a bankrupt and his case referred to Referee in Bankruptcy S. W. McNabb for administration. Thereafter V. W. Erickson was appointed and qualified as Trustee in Bankruptcy.

During the course of the proceedings and within the time limit fixed by Section 57-h of the Bankruptcy Act, Friend W. Richardson, as Superintendent of Banks of the State of California and in charge of the liquidation of the Bank of San Pedro, an insolvent California state banking corporation, filed a general claim against the bankrupt estate in the sum of \$260,200.00.

Thereafter the said Trustee in Bankruptcy filed his written objections to the allowance of the claim and the same were heard and determined by the Referee in Bankruptcy. On May 9, 1935, the Referee in Bankruptcy overruled such objections and made and entered his order allowing the claim, and thereupon the Trustee in Bankruptcy filed with the Referee his petition for a review by the Judge of the Court of such order, and thereafter and on May 13, 1935, the above entitled Court reviewed such order and confirmed the same and granted to said Trustee in Bankruptcy an exception to such ruling.

The facts were not disputed and a summary of the evidence produced at the hearing is as follows:

On April 24, 1931, the Governor of the State of California approved an act passed by the Legislature of the State of California, the same to be in effect on August 13, 1931, which act is known as Chapter 196 of the Statutes of California 1931 (Statutes and Amendments to the

Codes of California, 1931, page 338) entitled, "An Act to Define the Liability of Stockholders in California State Banks, and to Provide for the Enforcement and Collection of that Liability by the Superintendent of Banks of the State of California." Prior to the bankruptcy of the above named bankrupt, Friend W. Richardson, as Superintendent of Banks of the State of California and the Claimant herein took possession and charge of the assets of the Bank of San Pedro, an insolvent banking corporation, and proceeded to liquidate the same and distribute the proceeds among the persons entitled thereto pursuant to the powers vested in him by the Laws of the State of California. At the time the Superintendent of Banks so took possession of such assets, the bankrupt was a stockholder of said bank corporation and the owner of 2602 shares of the Common Capital Stock of said Bank of the par value of \$100.00 per share, and was such owner for many years prior thereto. The said Bank of San Pedro was a banking corporation, organized and existing under the laws of the State of California. Section 1 of said Act provides that the stockholders of every California banking corporation are liable, equally and ratably, and not one for another, for all contracts, debts and engagements of said corporation to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares. Section 2 of said Act provides that when the California Superintendent of Banks takes possession of the business and property of any California banking corporation for the purpose of liquidating its affairs, he may at any time during the progress of such liquidation, if necessary to pay the debts of such corporation, enforce the individual liability of such stockholders as set forth in said Section 1

of said Act, and that in order to enforce such liability, he may call for a ratable assessment upon such stockholders, and that any such assessment shall be levied by order of said Superintendent of Banks under his official seal, which order shall be executed in duplicate, one to be filed in the office of the Superintendent of Banks, and one with the papers in the liquidation proceedings in the County in which said Bank shall have been located. Los Angeles is the County in which said Bank of San Pedro is located. Prior to bankruptcy herein, no such assessment upon the stockholders or the bankrupt was levied by any order of said Friend W. Richardson, as such Superintendent of Banks in connection with the liquidation of the affairs of said Bank of San Pedro. About two months after the commencement of the bankruptcy such assessment was levied by the Superintendent of Banks upon the stockholders of the Bank of San Pedro, including the bankrupt.

The principal objections of the Trustee to the allowance of the claim were that, by reason of such facts, (1) no provable debt under the provisions of Section 63 of the Bankruptcy Act existed as between the said Superintendent of Banks and the bankrupt estate, in connection with the affairs of said Bank of San Pedro, and (2) the claim was neither fixed in amount nor susceptible of liquidation as of the date of the filing of the petition in bankruptcy and (3) the claim was so wholly contingent, as of the date of the filing of the petition in bankruptcy, as to be incapable of proof as of that date for the reasons that no assessment under said State statute was levied by said Superintendent of Banks prior to bankruptcy, and, therefore, no right of action as against the bankrupt existed at that time, and that any assessment that might be levied by said Superintendent of Banks subsequent to bank-

ruptcy would create a liability on the part of the bankrupt that would be personally chargeable against him, and not against his estate and that would not be dischargeable in bankruptcy under the provisions of Section 17 of the Bankruptcy Act. It was the contention of the Trustee that the liability, if any, under said State statute was purely statutory and not contractual and did not arise until the actual levy of the assessment. The claimant contended that the liability under the state statute was contractual and was, at least, inchoate and potential from the time of the acquisition of said shares of stock by the bankrupt, and that the filing of the petition in bankruptcy was equivalent to an anticipatory breach of such contractual liability, giving rise to a claim that could be proved by the claimant herein, and would have to be allowed by the Bankruptcy Court during the administration as a general claim against the estate.

Thereafter, within the time and in the form and manner provided by law, the said Trustee in Bankruptcy duly and regularly perfected an appeal from said order of the District Court made on May 13, 1935, to the United States Circuit Court of Appeals for the Ninth Circuit, such appeal having been allowed by the above entitled Court, and a citation having been issued, after such appellant had filed his petition for the allowance of the appeal together with his assignment of errors. The Trustee in Bankruptcy, pursuant to Section 25-c of the Bankruptcy Act, was not required to file a bond.

IT IS HEREBY STIPULATED AND AGREED that the foregoing agreed statement of the case is true and correct and that all of the facts therein stated concerning the record may be regarded as true by the said United



States Circuit Court of Appeals for the Ninth Circuit and shall be taken and deemed by the Court as made pursuant to Equity Rule 77.

Dated this 20th day of May, 1935.

GRAINER AND HUNT

By Reuben G. Hunt

Attorneys for V. W. Erickson, Trustee in  
Bankruptcy of the estate of Henry E.  
Sherer,

Bankrupt

CLOCK, McWHINNEY & CLOCK

By John G. Clock

Attorneys for Friend W. Richardson, Su-  
perintendent of Banks of the State of  
California and in charge of the liquida-  
tion of the Bank of San Pedro, an in-  
solvent state banking corporation.

The foregoing agreed statement of the case is hereby approved, and

IT IS HEREBY ORDERED that such statement be filed with the Clerk of the above entitled Court and that a certified copy thereof be filed with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

Dated this 20 day of May, 1935.

Hollzer

DISTRICT JUDGE

[Endorsed]: Filed May 20 1935 at 10 min. past 11 o'clock a. m. R. S. Zimmerman, Clerk. Theodore Hocke, Deputy.

IN THE DISTRICT COURT OF THE UNITED  
STATES SOUTHERN DISTRICT OF CALI-  
FORNIA CENTRAL DIVISION

	)	No. 24,925-H
In the Matter of	)	
	)	PETITION FOR
HENRY E. SHERER,	)	APPEAL
	)	AND ORDER
Bankrupt	)	ALLOWING APPEAL
	)	

V. W. ERICKSON, the Trustee in Bankruptcy of this estate, feeling himself aggrieved by the final order of the above entitled Court in the above entitled proceeding made and entered therein on May 13, 1935, affirming the order of S. W. McNabb, Referee in Bankruptcy in the above entitled proceeding, made on May 9, 1935, allowing for the sum of \$260,200.00 the general claim filed in said proceeding by Friend W. Richardson, as Superintendent of Banks of the State of California and in charge of the liquidation of the Bank of San Pedro, an insolvent California state banking corporation, does hereby petition for an appeal from said Order to the United States Circuit Court of Appeals for the Ninth Circuit for the reasons and upon the grounds set forth in the Assignments of Error filed herewith, and prays that an appeal may be allowed and a citation issued directed to said Friend W. Richardson, as Superintendent of Banks of the State of California and in charge of the liquidation of the Bank of San Pedro, an insolvent California state banking corporation, commanding him to appear before said United States Circuit Court of Appeals for the Ninth Circuit to

do and receive what may appertain to justice to be done in the premises, and that a transcript of the record, proceedings and evidence in the above entitled proceeding duly authenticated may be transmitted to the said United States Circuit Court of Appeals for the Ninth Circuit, or for such other, further or different order or relief as may be meet in the premises.

Dated this 16th day of May, 1935.

V. W. Erickson  
Trustee in Bankruptcy of the estate  
of Henry E. Sherer,  
Bankrupt

GRAINGER AND HUNT

By Reuben G. Hunt  
Attorneys for Trustee

#### ORDER ALLOWING APPEAL

The foregoing appeal is hereby allowed, and, pursuant to the provisions of Section 25-c of the Bankruptcy Act,

IT IS ORDERED that a citation upon said appeal issue herein without bond.

Dated at Los Angeles in said District this 16th day of May, 1935.

Hollzer  
UNITED STATES DISTRICT JUDGE

[Endorsed]: Filed May 17 1935 at 2 o'clock P. M.  
R. S. Zimmerman, Clerk. Theodore Hocke, Deputy.

[TITLE OF COURT AND CAUSE.]

### ASSIGNMENTS OF ERROR

Now comes V. W. ERICKSON, as Trustee in Bankruptcy of the estate of Henry E. Sherer, Bankrupt, and in support of his appeal from the order of the above entitled Court in the above entitled proceeding made and entered therein on May 13, 1935, affirming the order of S. W. McNabb, Referee in Bankruptcy in the above entitled proceeding, made on May 9, 1935, allowing for the sum of \$260,200.00 the general claim filed in said proceeding by Friend W. Richardson, as Superintendent of Banks of the State of California and in charge of the liquidation of the Bank of San Pedro, an insolvent California state banking corporation, and sets forth that the said order of the District Court was erroneous by reason of the following:

1. The said claim is not based upon any debt provable against the bankrupt estate under the provisions of Section 63 of the Bankruptcy Act for the reasons that:

(a) The said alleged debt was neither fixed in amount nor susceptible of liquidation as of the date of the filing of the petition in bankruptcy.

(b) The said alleged debt is not founded upon an open account, or upon a contract, express or implied, and the said debt, if any, is statutory only and not contractual.

(c) The said alleged debt is wholly contingent as of the date of the filing of the petition in bankruptcy and is incapable of proof as of that date.

All of which, for the reasons that no assessment under the State banking laws of California was levied by the Superintendent of Banks prior to bankruptcy and no right of action against the bankrupt existed at that date, and that any assessment that might be levied by said Superintendent of Banks subsequent to bankruptcy would create a liability on the part of the bankrupt that would be personally chargeable against him and not against his estate and that would not be dischargeable in bankruptcy under the provisions of Section 17 of the Bankruptcy Act.

WHEREFORE, the said Trustee in Bankruptcy prays that said order of the District Court of May 13, 1935, be reversed and the lower court be directed to enter an order disallowing the said claim for the full amount claimed.

Dated this 16th day of May, 1935.

V. W. Erickson,

Trustee in Bankruptcy of the Estate  
of Henry E. Sherer,

Bankrupt

GRAINGER AND HUNT,

By Reuben G. Hunt

Attorneys for Trustee

[Endorsed]: Filed May 17 1935 at 2 o'clock P. M.  
R. S. Zimmerman, Clerk. Theodore Hocke, Deputy.

[TITLE OF COURT AND CAUSE.]

STIPULATION FOR CONTENTS OF RECORD ON  
APPEAL

IT IS HEREBY STIPULATED by and between the parties hereto that the Clerk of the Court in making up the record on appeal herein to the United States Circuit Court of Appeals for the Ninth Circuit from the order of the above entitled Court made on May 13, 1935, confirming the order of the Referee in Bankruptcy allowing the claim of Friend W. Richardson, as Superintendent of Banks, against the estate for \$260,200.00, shall include the following papers only:

1. Agreed Statement of the Case;
2. The Order of the Court made May 13, 1935;
3. Petition for appeal and Order allowing same;
4. Assignment of Errors;
5. Citation on Appeal.

IT IS FURTHER STIPULATED that the whole title of the court and cause shall be omitted, except in connection with the Agreed Statement of the Case, and shall be referred to only as "Title of Court and Cause".

Dated this 20th day of May, 1935.

GRAINGER AND HUNT

By Reuben G. Hunt

Attorneys for V. W. Erickson,  
Trustee in Bankruptcy of the estate of Henry E. Sherer,

Bankrupt.

CLOCK, McWHINNEY & CLOCK

By John G. Clock

Attorneys for Friend W. Richardson,  
Superintendent of Banks

[Endorsed]: Filed May 20 1935 at 10 min. past 11 o'clock A. M. R. S. Zimmerman, Clerk Theodore Hocke, Deputy.

[TITLE OF COURT AND CAUSE.]

CLERK'S CERTIFICATE.

I, R. S. Zimmerman, clerk of the United States District Court for the Southern District of California, do hereby certify the foregoing volume containing 16 pages, numbered from 1 to 16 inclusive, to be the Transcript of Record on Appeal in the above entitled cause, as printed by the appellant, and presented to me for comparison and certification, and that the same has been compared and corrected by me and contains a full, true and correct copy of the citation; order confirming order of referee allowing claim; agreed statement of the case; petition for appeal and order allowing appeal; assignments of error, and stipulation for contents of record on appeal.

I DO FURTHER CERTIFY that the amount paid for printing the foregoing record on appeal is \$            and that said amount has been paid the printer by the appellant herein and a receipted bill is herewith enclosed, also that the fees of the Clerk for comparing, correcting and certifying the foregoing Record on Appeal amount to ..... and that said amount has been paid me by the appellant herein.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Seal of the District Court of the United States of America, in and for the Southern District of California, Central Division, this..... day of May, in the year of Our Lord One Thousand Nine Hundred and Thirty-five and of our Independence the One Hundred and Fifty-ninth.

R. S. ZIMMERMAN,  
Clerk of the District Court of the  
United States of America, in  
and for the Southern District  
of California.

By

Deputy.